

THE HONORABLE MARSHA J. PECHMAN

**UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON AT SEATTLE**

MAURICIO A. LEON, M.D.,

Plaintiff,

vs.

IDX SYSTEMS CORPORATION, a Vermont
Corporation,

Defendant.

Case No. CV03-1158P

**DEFENDANT IDX'S REPLY IN
SUPPORT OF BILL OF COSTS**

Defendant IDX prevailed on the merits when Plaintiff Leon's case was dismissed and he was sanctioned for destroying evidence. As the prevailing party, IDX is therefore entitled to its costs. Leon's legal arguments that IDX should be denied its costs are based on his misunderstanding of the Local Rules and the authority now vested in the Clerk. Incredibly, Leon also argues that IDX should be denied its right to recover properly taxable costs because Leon was already sanctioned for his wrongful conduct that resulted in the dismissal of his claims. However, the Court awarded IDX these sanctions for its attorney's fees and expert witness expenses incurred in order to uncover and litigate Leon's destruction of evidence, which are wholly separate from the costs to which IDX is entitled as the prevailing party. IDX should therefore be awarded the costs set forth in its cost bill.

REPLY IN SUPPORT OF BILL OF COSTS -1-

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1 **1. The Sanctions Entered Against Leon are Irrelevant to IDX's Entitlement to**
 2 **Its Costs.**

3 In its Order of September 30, 2004, the Court dismissed Leon's claims with prejudice and
 4 ordered him to pay \$65,000 "to restore IDX to where it would have been had Dr. Leon observed
 5 the rules of litigation...." Order at p. 9 (Dkt. # 285). The Order also noted that IDX had
 6 submitted a detailed affidavit outlining the expenses it incurred investigating and litigating
 7 Leon's spoliation. *Id.* at p. 8. That affidavit (declaration) in turn makes clear that the expenses
 8 awarded as sanctions are wholly separate from the costs detailed in IDX's bill of costs. *See*
 9 Supplemental Declaration of Angelo Calfo (Dkt. # 259).

10 Leon disregards the mandate of F.R.C.P. 54(d) , which "creates a presumption for
 11 awarding costs to prevailing parties...." *Stanley v. Univ. of Southern California*, 178 F. 3d 1069,
 12 1079 (9th Cir. 1999). Moreover, Leon cites no legal support for the argument that IDX can or
 13 should be denied its taxable costs merely because Leon was sanctioned for litigation misconduct.
 14 IDX respectfully submits that the Court's decision to award sanctions would be undercut by
 15 denying IDX its costs, which would, in effect, reward Leon for being sanctioned.

16 **2. IDX's Request for Costs Complies with the Local Rule.**

17 Local Rule 54(d) states that all costs "shall be specified, so that the nature of the charge
 18 can be readily understood. The movant shall verify by oath of the party or an agent having
 19 knowledge of the facts that such costs and disbursements have been necessarily incurred in the
 20 action." CR 54(d)(1). The Rule goes on to provide that "[m]otions for costs shall be decided by
 21 the clerk on the pleadings without oral argument unless the clerk specifically directs the parties
 22 to appear for a hearing." CR 54(d)(3). Finally, the Rule sets forth specific rules to be observed
 23 in taxing costs, and concludes that costs are to be taxed in accordance with, *inter alia*, 28 U.S.C.
 24 § 1920. *Id.*

1 In its bill of costs, IDX set forth in detail the items of costs it asks the Clerk to award.
 2 The cost of each deposition is stated specifically, broken out by deponent. Likewise, the witness
 3 fees are broken out for each witness.

4 IDX set forth its costs of copying, which included the production to Leon of well in
 5 excess of 100,000 pages, and IDX heavily discounted the total cost by fifty percent to account
 6 for the fact that a portion of the copying costs was not properly chargeable to Leon, such as costs
 7 associated with responding to NIST's suspension of payment for the SAGE project and Leon's
 8 Sarbanes-Oxley claim. IDX noted that the copying costs were for the voluminous production of
 9 documents sought by Leon, as well as for exhibits, pleadings, documents provided to expert
 10 witnesses and the like. The Declarations make clear these copying costs were necessarily
 11 incurred.

12 Leon has cited no authority from this Circuit requiring that each and every photocopy be
 13 tracked and itemized separately, and IDX has reduced by fifty percent its costs to fairly reflect
 14 that some of the copying related to the other matters initiated by Leon. Moreover, Leon's cite to
 15 *Billings v Cape Cod Child Dev. Prgr.*, 270 F.Supp.2d 175, 178 (D. Mass. 2003) for the
 16 proposition that copying costs must be itemized is wholly misleading. There, the court said it was
 17 difficult to believe the short trial required the amount of photocopying expense that was
 18 requested, and because the costs were not itemized, the item was disallowed. Thus, the court did
 19 not disallow copying costs merely because there was no itemization, but rather because the
 20 requested costs were excessive.¹ The instant case has been hotly litigated for over 20 months,
 21 and involves over 260 court filings, hundreds of deposition exhibits, ten expert witnesses, twenty

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 23 ¹ Leon's reliance on *Zapeta Gulf Marine Corp. v. Puerto Rico Marine Shipping Authority*, 133 F.R.D. 481 (E.D. La.
 24 1990) is also misplaced. There the party seeking copying costs failed to explain in any respect what the copies were
 for or how they were used. IDX has made clear in its filings and declarations of counsel the categories of what was
 copied and why – and the copy costs related predominantly to responding to Leon's broad discovery requests.

1 five depositions, extensive third party discovery, and a huge document production. The
2 associated copying costs are in proportion to the magnitude of the case.

3 Next, IDX itemized each and every fee for service of process. Leon's assertion that he
4 would have agreed to accept process for third parties is not only self-serving, but ignores that
5 Leon does not have the unilateral authority to make such decisions. Notably, Leon does not
6 dispute that the process costs were actually incurred. Finally, as required by CR 54(d), IDX
7 submitted Declarations of its counsel verifying that all of the costs and disbursements were
8 necessarily incurred in the action.²

9 Contrary to Leon's assertion, there is no requirement in the governing Rules or statutes
10 that IDX produce a "back-up" or additional "documentation" of the itemized costs. Although
11 IDX can produce itemizations of costs that are reflected in the billing records of its counsel, and
12 even the underlying receipts for external disbursements, the Declarations of M. Edward Taylor
13 and Angelo Calfo make clear that the requested costs were drawn from those very records such
14 that nothing would be gained by deluging the Clerk with unnecessary reams of paper. Of course,
15 if the Clerk requests the underlying documentation, even though Leon has not presented any
16 evidence challenging the fact or necessity of the costs, IDX will produce the same.

17 **3. The Clerk has the Authority to Tax the Requested Costs.**

18 Local Rule 54(d) makes clear that motions for costs are decided in the first instance by
19 the Clerk. This includes the specific items of cost identified in the Rule, and costs under the
20 general federal cost statute, 28 U.S.C. §1920.

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23 ² Leon's argument that IDX may not incur copy costs associated with filing motions with the court and serving
24 opposing counsel ignores the fact that most, if not all, the motions and related pleadings in this case were filed and
served electronically and therefore there were no associated copy cost.

1 Leon erroneously argues that the Clerk does not have the authority to tax discretionary
2 costs, such as those for depositions, citing *Sea Coast Foods, Inc. v. Lu-Mar Lobster and Shrimp,*
3 *Inc.*, 260 F.3d 1054 (9th Cir. 2001). There, the Clerk had refused to award deposition and
4 copying costs on the ground that he lacked authority to do so because the materials had not been
5 used at a trial. The district court affirmed the award of costs for the reasons stated therein. The
6 Ninth Circuit in turn held that the district court did have the discretionary authority to award such
7 costs, and that it had erred in failing to exercise its discretion. The Court did not address
8 whether by local rule the district court could delegate to the Clerk in the first instance the
9 discretion to award deposition and copying costs.

10 Local Rule 54 (d), was amended after the *Lu-Mar* decision, and now states that *all*
11 motions for costs are decided by the Clerk, and explicitly authorizes the Clerk to tax “all other
12 costs...in accordance with 28 U.S.C. § 1920” and other statutes. CR 54(d)(3)(D). The *Lu-Mar*
13 decision makes clear that deposition and copying costs are awardable under § 1920, as are
14 witness fees and fees for service of process. IDX therefore respectfully requests that the Clerk
15 tax the costs submitted by IDX. If Leon is dissatisfied, he can of course appeal the taxation of
16 costs to the Court.

CONCLUSION

For the foregoing reasons, IDX requests that the Clerk tax against Leon the full amount of the costs set forth in its cost bill.

DATED this 5th day of January, 2005.

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